95-1896 (3)

No. _____

Supreme Court, U.S.
FILED
JUN 24 1996
CLERK

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1995

FULLY INFORMED JURY ASSOCIATION, et al.,

Petitioners,

v.

COUNTY OF SAN DIEGO, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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18 pp

QUESTIONS PRESENTED

1. Whether the City of San Diego is a proper respondent in this matter.

2. Whether the Ninth Circuit Court of Appeals erred in concluding that General Order No. 102093 and General Order No. 2-14-94 were valid place and manner restrictions issued by the San Diego County Courts.

PARTIES TO THE PROCEEDING

Respondent agrees with Petitioners' list of parties in the caption of the Petition for Writ of Certiorari. However, it is the position of these Respondents' that the City of San Diego and its Police Chief, Jerry Sanders, should no longer be parties to this matter.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW, JURISDICTION, CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE	1
SUMMARY OF ARGUMENT	2
STATEMENT OF THE CASE	4
A. The Ninth Circuit Court of Appeals Correctly Applied the Law Governing Restrictions on Speech in Public Forums, and Did Not Create Any Law of Uniformity in the Law Government Free Speech	7
B. The Case Turns Solely Upon the Analysis of Factual Findings Made By the District Court and Affirmed by the Court of Appeals	9
C. The City of San Diego and Its Police Chief Were Not Involved in the Issuance of the Orders, Nor Their Enforcement	11
D. This Case Does Not Raise Questions of Exceptional Importance	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Burson v. Freeman, 504 U.S. 191 (1992) 2,7,8

Cox v. Louisiana, 379 U.S. 559 (1965) 2,7,8

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) ... 10

Ward v. Rock Against Racism, 491 U.S. 781 (1989) ... 2,8

STATUTES AND RULE

42 U.S.C. section 1983 5

Fed. R. Civ. P 12(b)(6) 6

OPINION BELOW JURISDICTION, CONSTITUTIONAL PROVISIONS AND GENERAL ORDERS INVOLVED IN THIS PROCEEDING

Respondent agrees with petitioners' statement regarding the opinions below, jurisdiction of this court, and the constitutional provision and general orders involved in this case.

SUMMARY OF ARGUMENT

The City of San Diego and San Diego Chief of Police, Jerry Sanders were named as parties to the original complaint. However, there are no allegations regarding any actions by the City which remain at issue in this matter. The Ninth Circuit was correct in affirming the judgment of the district court in regards to City respondents based upon the lack of allegations of any action on the part of the City and Police Chief Sanders.

In addition, the Ninth Circuit Court of Appeals was correct in finding that the challenged orders are proper exercises of a court's inherent authority to take supervisory and administrative actions necessary to implement its judicial functions. The appellate court correctly applied *Burson v. Freeman*, 504 U.S. 191 (1992) and *Cox v. Louisiana*, 379 U.S. 559 (1965), in determining that the first regulation was necessary to serve the compelling state interest in protecting the integrity of the jury system and is narrowly tailored to achieve that end. In addition, the appellate court was correct in applying the standards set forth in *Ward v. Rock Against Racism*, 491

U.S. 781 (1989), in finding the second regulation a content neutral restriction narrowly tailored to further the significant state interest in securing the area around the court house and leaves open ample alternative channels of communication of information.

Furthermore, petitioner seeks review of concurrent findings of fact of two lower courts. There are no novel constitutional issues to be considered here, and there is no conflict between any circuits as to the applicable laws and cases. Therefore this mattter is not appropriate for review by this court.

STATEMENT OF THE CASE

On October 22, 1993, the presiding judges of the San Diego Superior and Municipal Courts issued an order in response to the distribution of written materials advocating jury nullification to persons entering the San Diego County Superior Court. Noting that the doctrine of jury nullification is contrary to law, General Order No. 102093 was issued with the purpose of protecting the lawful and orderly administration of justice and the right to trial by jury. The order prohibited the distribution of written materials to or communications with trial jurors intended to influence or interfere with the proper discharge of the duties of trial jurors within 50 yards of the front entrance of facilities within which jury trials are held. Respondents, City of San Diego and Police Chief Jerry Sanders, took no part in the issuance or enforcement of this order.

On February 14, 1994, the presiding judge of the San Diego County Superior Court issued General Order No. 2-14-94 which ordered the removal of all newsracks located on the sidewalk bordering the front entrance of the San Diego County

Courthouse within two weeks of the date of the order. The concern addressed by the order was to protect public safety by eliminating congestion in front of the courthouse and the elimination of the detraction from the dignity and appearance of the County's main courthouse. Respondents, City of San Diego and Police Chief Sanders, had no involvement with either the issuance of the order or the removal of the newsracks.

Petitioners filed a complaint in the United States District Court for the Southern District of California on July 21, 1994. The complaint requested a temporary restraining order, preliminary and permanent injunctions, declaratory relief and damages pursuant to 42 U.S.C. section 1983. City respondent was named as a defendant in petitioners' complaint on the basis of allegations that the city newsrack ordinance was unconstitutional and that the ordinance was cited in the general order. Additionally, the complaint contained allegations regarding demonstrations held by members of the Fully Informed Jury Association near City Hall and near the County Administration Building. Petitioners' alleged that a person told

them to leave or the police would be called. There were no allegations that the police were notified, took any action, or that the demonstration stopped.

On August 15, 1994, respondent, City of San Diego, filed a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6) and a motion for a more definite statement with the district court. City respondent filed a motion in opposition to petitioners' preliminary injunction on September 23, 1994, on grounds that petitioners alleged no action on the part of the city which violated petitioners' constitutional rights.

The district court granted respondents' motion to dismiss on October 31, 1994, finding that petitioners had alleged no action on the part of respondents that deprived petitioners of their constitutional rights. That same day the district court denied petitioners' motion for preliminary injunction on grounds that both orders were valid place and manner restrictions. Petitioners' were given leave to amend regarding the demonstration allegations, which they did not do. Petitioners' filed a timely appeal to the Ninth Circuit Court of

Appeals, which affirmed the judgement below. In the papers and at the oral argument at the Ninth Circuit Petitioners' made clear they were no longer the challenging the consitutionality of the Newsrack Ordinance.

A. THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE LAW GOVERNING RESTRICTIONS ON SPEECH IN PUBLIC FORUMS, AND DID NOT CREATE ANY LACK OF UNIFORMITY IN THE LAW GOVERNING FREE SPEECH

The Ninth Circuit Court of Appeals, in its opinion, held that both General Order No. 102093 and General Order No. 2-14-94 were proper exercises of a courts inherent authority to take supervisory and administrative actions necessary to implement its judicial function. (Petitioners Appendix A, page 3a). Additionally, based on that holding, the Court affirmed the district court decision to grant the City respondents motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (*Id.*)

The Ninth Circuit examined General Order No. 102093 under *Burson v. Freeman*, 504 U.S. 191 (1992), and *Cox v. Louisiana*, 379 U.S. 559 (1965). Contrary to petitioners'

contention that the facts presented in this matter do not fit within this court's decisions in *Burson* and *Cox*, neither case limited its reasoning to identical factual situations and were appropriately considered by the appellate court. The Ninth Circuit neither misapprehended nor misapplied those cases in its opinion. The court addressed each factor set forth in those cases and concluded that the regulation was necessary to serve the state's compelling interest in protecting the integrity of the jury system. In addition, the court found the restriction to be narrowly tailored to achieve that end. Thus, the court properly found that each element set forth in *Burson* and *Cox* was satisfied. (*Id.* at 2a-3a).

Additionally, the Ninth Circuit's application of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), to General Order No. 2-14-94 was appropriate. The Ninth Circuit found application of the order to all newsracks located on the sidewalk bordering the front of the courthouse to be content neutral and recognized that *Ward* sets forth the appropriate standard for determining the constitutionality of content neutral regulations

of speech. The court addressed each factor and did not deviate from the standard set forth in that case. (*Id.* at 3a).

For those reasons, it is respectfully requested that Petitioners' petition be denied.

B. THIS CASE TURNS SOLELY UPON THE ANALYSIS OF FACTUAL FINDINGS MADE BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS

Respondent contends that petitioner seeks review of concurrent findings of fact of two lower courts and that petitioner has shown no evidence to indicate a gross misapplication of law. This case turns upon the analysis of the propriety of the issuance of the two court orders. Petitioner would have the court determine factually whether General Order No. 102093 and General Order No. 2-14-94 are proper regulations of political speech and press in a public forum. Both the district court and the appellate court found the issuance of General Order Nos. 102093 and 2-14-94 to be proper exercises of a court's inherent authority to ensure the proper administration of justice. The appellate court found no clear error on the part of the district court. The appellate court

affirmed the district court's determination that the restrictions in General Order No. 102093 were necessary to serve the state's compelling interest in protecting the integrity of the jury system and narrowly drawn to achieve that end. The appellate court also found no error in the in regards to the second order. General Order No. 2-14-94 was found to be a content neutral regulation narrowly drawn to further a significant state interest in securing the area around the courthouse and leaving ample alternative channels for communication of the information.

Because the district court and appellate court have made concurrent findings of fact regarding the appropriateness of the orders issued in this case and petitioner has shown no clear error, the factual findings of the appellate court must be accorded deference. Therefore this case is not appropriate for review by this court. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). For this reason, it is respectfully requested that Petitioner's petition be denied.

C. THE CITY OF SAN DIEGO AND ITS POLICE CHIEF WERE NOT INVOLVED IN THE ISSUANCE OF THE ORDERS, NOR THEIR ENFORCEMENT.

The Ninth Circuit was correct in affirming the district courts decision regarding the constitutionality of City respondents' Municipal Code sections 62.1001-62.1013. The district court determined that there had been no allegations that the City had anything to do with the issuance of either order. (Petitioners' Appendix B, pages 8a-9a). Furthermore petitioners failed to allege any action on the part of the City of San Diego or San Diego Police Chief Jerry Sanders in regards to the enforcement of the orders. (*Id.*). Therefore, the City of San Diego is no longer a proper party to this matter.

D. THIS CASE DOES NOT RAISE QUESTIONS OF EXCEPTIONAL IMPORTANCE

While clearly freedom of speech is an important and fundamental right, this case does not present a matter of exceptional importance. Petitioners speculate as to the effect on society regarding jury nullification, but that is a political matter outside the scope of this case. This case deals with the ability of a court to properly administer its business, given the dictates of

the rights guaranteed by the Constitution. The lower courts correctly applied the applicable standards and determined that these orders were proper excercises of judicial authority, and that the City of San Diego and its Police Chief were not involved in this matter. For those reasons, it is respectfully requested that Petitioners' petition be denied.

CONCLUSION

The Ninth Circuit Court of Appeals did not misapprehend or misapply any points of law or facts in reaching its decision in this matter. The district court and the appellate court considered petitioners' arguments and made concurrent findings of fact which do not warrant review by this court. The City of San Diego and Police Chief Sanders are not proper parties before

this court. For those reasons, Respondent respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Dated: June 21, 1996

JOHN W. WITT, City Attorney

By James M. Chapin

James M. Chapin
Deputy City Attorney

Attorneys for Respondents
City of San Diego and Police
Chief Sanders

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

CERTIFICATE OF SERVICE

I, James M. Chapin, declare that I am, and was at the time of service of the papers herein referred to, am the attorney of record in the within action, and am a member of the bar of this Court, representing Respondents City of San Diego and Chief Sanders. I am a citizen of the United States, over the age of 18, and not a party to the within action. My business address is 1200 Third Avenue, Suite 1200, San Diego, California 92101.

On June 21, 1996, I served the **Response to Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Ciruit** on the following by placing one copy thereof in a separate envelope for each addressess named hereafter, addressed to each such addressee respectively as follows:

Peter D. Lepiscopo, Esq.
2635 Camino del Rio South
Suite 108
San Diego, California 92108

Clerk of Court
United States Court of Appeals
For the Ninth Circuit
121 Spear Street
P.O. Box 193939
San Francisco, CA 94119

I thereafter sealed and deposited such envelope in a United States mailbox with first-class postage prepaid.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Executed this 21st day of June, 1996, in San Diego, California.

James M Chapin

James M. Chapin